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No. 80-1563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD TRUCKING COMPANY, INC.
AND NORTH-WEST INSURANCE COMPANY,
Petitioners,

versus

EDGAR J. BOUDLOCHE AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901, et seq. as amended in 1972, affords coverage to a truck driver who spends some of his time performing longshoring operations; i.e., loading cargo directly to barges from his truck and vice-versa and sustains injury while so engaged.

LIST OF PARTIES, PARENT AND SUBSIDIARY COMPANIES

1. Edgar J. Boudloche.
2. Howard Trucking Company, Inc.
   A) Howard Construction Company, Subsidiary or related company.
3. Mid-Continent Underwriters, Inc.
4. North-West Insurance Company.
5. United States Department of Labor.

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Other Authorities:

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STATEMENT OF THE CASE

Edgar J. Boudloche, hereafter respondent or simply Boudloche, suffered injury in a covered situs while

actually engaged in a longshoring operation i.e., unloading a vessel, as required by his employer, petitioner herein. Further, petitioner does not dispute the fact that Boudloche was required as part and parcel of his employment with petitioner to engage in maritime employment, primarily loading and unloading, at least some of the time.

Boudloche agrees and adopts the balance of petitioner's statement of the case. However, respondent disagrees that a Writ of Certiorari should be granted for the reason that there is no real conflict among the various circuits and the decision entered by the Fifth Circuit is not contrary to the decision entered by the Supreme Court.

> "The decision of the Fifth Circuit Court of Appeals is contrary to the intent of Congress and the decisions of the United States Supreme Court in *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), and *P. C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979).

ARGUMENT

Petitioner, Howard Trucking Company, Inc., employed Boudloche and classified him broadly as a truck driver. Admittedly, substantial amounts of Boud-

loche's time was spent in truck driving and truck driving related activities. As a condition of Boudloche's employment, petitioner required that Boudloche regularly perform indisputably maritime operations, i.e., loading and unloading vessels, at least some of the time. These maritime functions were discharged at the water's edge, which all parties agree brings Boudloche within the situs provision of the LHWCA. Boudloche suffered injuries while unloading a vessel at a covered situs, namely a dock area. Accordingly, Boudloche comes within the protection of the LHWCA since he was injured while engaged in maritime employment at a covered situs in furtherance of his employment.

PETITIONER'S AUTHORITIES DISTINGUISHED

Conflict Among Circuits

Petitioner relies on *Weyerhaeuser Company v. Gilmore*, 528 F.2d 957 (9th Cir., 1975) cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976), *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3rd Cir., 1976), *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir., 1977) and *White v. Newport News Shipbuilding and Dry Dock Company*, 633 F.2d 1070 (4th Cir., 1980) to argue that the decision in Boudloche, the instant case, creates a conflict within the various circuits, presumably with regard to what the correct test should be in determining who is entitled to the benefits of the LHWCA. All four cases cited by petitioner

concerning a conflict can be readily reconciled with and/or distinguished from this case.

In *Weyerhaeuser*, the Court held that to be covered under the LHWCA, as amended in 1972, an employee at the time of his injury "be engaged in maritime employment." The claimant in that case did not have any duties involving the receipt of cargo logs at docks, moving logs into the mill for debarking or loading ships or operating the equipment that moved the logs from navigation to the mill or from the mill, as a finished product, back into navigation. The Court further found that a log pond was not in fact a part of the maritime navigation system. Boudloche though was involved in unloading and was in an area customarily so utilized.

In *Sea-Land*, a truck driver overturned a truck but not on a covered situs. The case actually held that where an employer was engaged in shipping and in motor freight operations, one must determine the specific function of the employee at the time of injury. Boudloche, beyond any doubt, suffered injury on a covered situs. Further, he was engaged in a longshoring operation, unloading a vessel, at the express request of his employer who had elected to engage not only in motor freight operations but also in traditional maritime employment, i.e., longshoring operations. Thus, Boudloche met a situs as well as a maritime function.

In *Maher,* a clerk suffered injury. This clerk was found to be purely a clerk. His job did not require him to participate in the loading or unloading of cargo. Boudloche, while called a truck driver, was required to load and unload at least some of the time and was in fact injured while engaged in an unloading operation. The injured worker was classified as a clerk by union contract. Boudloche may well be classified broadly as a truck driver. However, the 4th Circuit held that the critical question was whether an employee was engaged in maritime employment. In *White,* the Court found that the employee's regular functions were an integral part of shipbuilding. Similarly, Boudloche's functions were an integral part of the loading/unloading operation at least some of the time.

Contrary To Supreme Court Holdings

The 5th Circuit correctly reconciled the case at bar with the Supreme Court's prior decisions.

> "In *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), the Supreme Court held the Act's status requirement was met by a terminal laborer who sometimes worked at shore-based jobs and at other times performed a longshoreman's function. They defined longshoremen as 'persons whose employment is such that they spend at least some of their time in indisputably longshoring operations

%y(4)' 432 U.S. at 273, 97 S.Ct. at 2362. Two years later, in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225, the Court held status coverage extended to two land-based workers who handled ships' cargo only after it had come to rest following discharge. Determining that both men were engaged in the type of duties that longshoremen perform — moving cargo between ships and land transports — the Court decided that coverage under the Act was to be determined by what workers were required to do and not in terms of when or where they were required to do work. 'A worker responsible for some portion of that (longshoring) activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process.' 444 U.S. at 81, 100 S.Ct. at 337, 62 L.Ed.2d at 236.

Thus, the Court has looked at a worker who is required to perform a longshoreman's work a part of the time and to perform nonmaritime tasks the remainder of the time, and at workers whose total duties consisted of performing only a land-based portion of a longshoremen's job. In *Caputo* the Act's coverage was defined in terms of a worker spending 'at least some' of his time in longshoring operations. In *Ford* the Court held that workers who performed 'some' portion of the loading or un-

loading of a ship were covered. By these constructions the Court sought to effectuate congressional intent to expand coverage to a simple uniform standard which did not shift with an employer's momentary whim. By substituting its 'substantial portion' language for the Court's 'some' in the coverage definition, the Board has departed from the letter and the spirit of the High Court's rule. This, of course, it cannot do.

Boudloche was directed to regularly perform some portion of what was indisputably longshoring work at fully equipped docks and, for at least some part of his work, was required to perform the total maritime job at unequipped docks. The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make Boudloche a maritime employee under the Act."

Congressional Intent

Petitioner states that Congress did not intend and specifically excludes truck drivers on a covered situs. However the Congressional note referred to truck drivers whose responsibility on the waterfront is to pick up or deliver cargo unloaded from or destined for marine transportation and would not be covered. Obviously, Boudloche is not the type of truck driver referred to in the Congressional note in that Boudloche is

required to actively participate in placing cargo into navigation or withdrawing same from it. Boudloche respectfully refers this Court to *Odom Construction Company v. United States Department of Labor*, 622 F.2d 110 (5th Cir., 1980) wherein the 5th Circuit stated that the fact that an employed worker spent a great majority of his time on indisputably land based jobs did not preclude coverage under LHWCA wherein he was doing maritime work at the time of his injury and a significant part, twenty percent, of the employer's overall work was maritime in nature.

CONCLUSION

The 5th Circuit addressed the specific coverage issue of whether or not a truck driver injured while engaged in longshoring activity at a covered situs came under the protection of LHWCA and found that he did. Whether or not he would be covered if not engaged in longshoring activity did not have to be addressed to resolve the issue. If petitioner did not desire to have its employees covered under this fact situation there petitioner simply should not require employees to engage in longshoring activities some of the time. Accordingly, petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been forwarded to opposing counsel, to-wit:

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by mailing the same in the U.S. Mail, First Class, with the proper postage affixed thereon and properly addressed.

This the ____ day of May, 1981.

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